Public Prosecutor v Ottavio Quattrocchi

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPLICATION NO W-09-37 OF 2002

ABDUL HAMID MOHAMAD, RAHMAH HUSSAIN AND HASHIM YUSOFF JJCA

30 APRIL 2003

Criminal Procedure *— Extradition — Discharge, decision as to — High Court affirmed sessions court's decision to discharge respondent upon application for review by public prosecutor — Public prosecutor appealed to Court of Appeal against decision of High Court — Whether there was right of appeal from High Court to Court of Appeal — Whether decision of High Court final and conclusive — Extradition Act 1992 s 37(6)*

International Law *— Extradition — Procedure — Power of sessions court to discharge fugitive criminal or commit him to prison — Whether there was provision for appeal from decision of sessions court to the High Court — Fugitive criminal committed to prison to apply to High Court for writ of habeas corpus — Application by public prosecutor to High Court for review in the case where fugitive criminal discharged — Whether decision of High Court final and conclusive — Whether there was right of appeal from High Court to Court of Appeal — Extradition Act 1992 s 37(6)*

The respondent, an Italian national, had lived in India since 1964. When in India he had given an undertaking through his counsel to the Supreme Court of India that he would present himself for investigation. However, in breach of the undertaking he failed to turn up as promised. He left India and came to Malaysia on 29 July 1993. The Union of India sought the extradition of the respondent for offences involving criminal conspiracy. Upon request for extradition by India, the Malaysian Ministry of Home Affairs, on 15 December 2000, issued a special direction under s 3 of the Extradition Act 1992 ('the Act'). A warrant of apprehension was issued by the magistrate under s 13(1) of the Act on 8 December 2000 and the respondent was arrested on 20 December 2000. When the respondent appeared before the sessions court, he was granted bail pending the hearing of the extradition proceedings. He was required to surrender his international passport and deposit a sum of RM400,000 into court. On the same day, the respondent's counsel gave notice that he would be raising two preliminary objections, namely: (a) that no charges had been framed against the respondent by the Union of India; and (b) when the warrant of apprehension was executed, no charges had been read out to the respondent. On 2 December 2002, the sessions court judge upheld the preliminary objections and decided that the respondent should be discharged unconditionally. Accordingly, the respondent's international passport was returned to him. On 3 December 2002, the public prosecutor ('the applicant') filed an application in the High Court

for a review of the order of the sessions court under s 37(1) of the Act. On 13 December 2002, the High Court judge dismissed the review application and confirmed the decision of the sessions court. As a result the respondent was released unconditionally. The applicant then filed a notice of appeal to the Court of Appeal ('the notice of appeal'). On 16 December 2002, on the ex parte application of the applicant under s 44(1) of the Courts of Judicature Act 1964 ('the ex parte application'), this court ordered that the travel documents of the respondent including his international passports and/or restricted passports be surrendered to court pending the final disposal of the applicant's appeal to the Court of Appeal or further order ('the said order'). This was the respondent's application in encl 15(a) to set aside the said order and to strike out the notice of appeal. The grounds relied upon by the respondent in support of encl 15(a) were: (a) non-disclosure of material fact by the applicant when making the ex parte application that the respondent had left Malaysia; (b) the matter was now academic as the respondent was no longer in Malaysia; and (c) there was no right of appeal against the decision of the High Court in the review proceedings. Encik Kamarul Hisham, for the applicant, raised a preliminary issue at the beginning of the hearing of encl 15(a) that the respondent must observe the said order first before he should be heard on his application to set aside the said order.

Held, overruling the applicant's preliminary objection and allowing encl 15(a):

(1) At the time when the respondent left Malaysia on 14 December 2002, the said order had not been made yet. To require him to comply with the said order first before encl 15(a) could be heard would mean that he would have to come back to Malaysia not only to surrender his passport but, effectively, to surrender himself when in fact he had been unconditionally discharged. Therefore, the applicant's preliminary objection was overruled (see pp 133H, 134A–B) *Chuck v Cremer* 1 Coop T Cott 338 distinguished, *Hadkinson v Hadkinson* [1952] 2 All ER 567 distinguished, *Wee Choo Keong v MBf Holdings Bhd* [1993] 2 MLJ 217 distinguished and *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577 distinguished.

(2) On the question of whether the applicant knew or did not know that the respondent had left Malaysia before the ex parte application was made, the affidavit evidence of the respective parties was conflicting. Based on such affidavit evidence alone, it would not be right for the Court of Appeal to make a definite finding of fact of whether the applicant knew that the respondent had left the country when the ex parte application was filed. In the circumstances, it could not be said that the applicant was guilty of

A non-disclosure of a material fact when making the ex parte application. As such, this ground could not be a ground to set aside the said order (see p 134F–I).

(3) On the question of whether the said order was academic, the purpose of the said order was to prevent the respondent from B leaving Malaysia pending the disposal of the appeal. If the said order were in the form of an injunction to restrain the respondent from leaving the country (which it was not), then the ex parte application would have been academic. But the said order was for the respondent to surrender his international passport and there was no time limit for him to do so. The respondent may choose to C return to Malaysia and surrender his passport or he may return and the said order may then be enforced on him. Furthermore, the respondent had lived in Malaysia since 1993 and was a director of a company here. Therefore, considering the nature of the said order and the circumstances of the case, the said order D was not academic in the sense that it cannot be complied or enforced at all. In the circumstances, the said order was not academic (see p 135D–H).

(4) The powers and jurisdiction to inquire into an extradition matter were vested in the sessions court and in accordance with the procedures specified under the Act. The sessions court may make E one of the two orders, namely, to discharge the fugitive criminal if no prima facie case was made out or commit him to prison if a prima facie case was made out. There was no provision for appeal from the decision of the sessions court to the High Court. Instead, if the fugitive criminal was committed to prison he may F apply to the High Court for a writ of habeas corpus in accordance with the procedure as provided in the Criminal Procedure Code. The Act was silent regarding appeal from the High Court in the habeas corpus proceedings. On the other hand, if the fugitive criminal was discharged by the sessions court, the public prosecutor may, at the request of the country seeking his return, G apply to the High Court for a review. The High Court may confirm, vary or quash the order of the sessions court or make a new order in substitution for the order so quashed and pursuant to s 37(6) of the Act, the order of the High Court shall be final and conclusive. Therefore, the way to challenge the decision of the sessions court was either by way of an application for a writ of H habeas corpus (on the application of the fugitive criminal) or by way of a review (on the application of the public prosecutor) (see pp 137G, 138H–139A, D–E).

(5) As for whether there was a right of further appeal from the High Court to the Court of Appeal, the Act was silent regarding a I decision of the High Court in a habeas corpus application by the fugitive criminal. However, s 36 of the Act provided that the application for habeas corpus was to be made in accordance with

the Criminal Procedure Code and hence, s 374 of the Criminal Procedure Code regarding appeal against a decision in a habeas corpus application was applicable. On the other hand, a decision of the High Court in an application for a review by the public prosecutor, was to be treated as final and conclusive. The words 'final and conclusive' meant that the orders were not appealable. Although the sessions court in the instant case had decided merely on the preliminary objection and not after a full enquiry, the fact remained that he had decided to discharge the respondent and it was against that decision that an application to the High Court was made for a review under s 37 of the Act, wherein the High Court judge had given his decision. It was against that decision of the High Court that the applicant purported to appeal to this court. However, in view of the provisions of s 37(6) of the Act, there was no right of appeal to this court (see pp 139F–H, 141H–142A).

(6) Section 50 of the Courts of Judicature Act 1964 did not apply but even if it did, it could not help the applicant. Section 50(1) provided that 'the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court ... in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court'. The word 'revisionary' referred to 'revision' in Chapter XXXI of the Criminal Procedure Code. The word 'appeal' cannot include 'review' as the Criminal Procedure Code did not provide for a review. For the same reason the word 'revision' cannot include 'review'. The word 'review' in the Act was purposely used to distinguish it from 'revision' under the Criminal Procedure Code (see p 142A–E).

(7) In the circumstances, the notice of appeal was void. It followed that the said order cannot stand as it was merely an interim order pending the disposal of the appeal. Accordingly, the said order and the notice of appeal should be struck out (see p 144A–B).

[Bahasa Malaysia summary

Responden, seorang warganegara Itali, telah menetap di India sejak tahun 1964. Ketika berada di India beliau telah memberi satu akujanji melalui peguam beliau kepada Mahkamah Agung India bahawa beliau akan mengemukakan dirinya untuk penyiasatan. Walau bagaimanapun, beliau telah mengingkar akujanji tersebut dan telah gagal untuk menghadirkan diri seperti yang diakujanjikan. Beliau telah meninggalkan India dan datang ke Malaysia pada 29 Julai 1993. Kesatuan India memohon serah-balik responden bagi kesalahan-kesalahan yang melibatkan konspirasi jenayah. Setelah permintaan serah-balik oleh India, Kementerian Hal Ehwal Dalam Negeri

Malaysia, telah pada 15 Disember 2000, mengeluarkan satu arahan khas di bawah s 3 Akta Ekstradisi 1992 ('Akta tersebut'). Satu waran pemberkasan telah dikeluarkan oleh majistret di bawah s 13(1) Akta tersebut pada 8 Disember 2000 dan responden telah ditangkap pada 20 Disember 2000. Ketika responden hadir di hadapan mahkamah sesyen, beliau telah dibenarkan untuk diikat jamin sementara menantikan pendengaran prosiding serah-balik. Beliau telah dikehendaki menyerahkan pasport antarabangsanya dan mendepositkan jumlah sebanyak RM400,000 ke dalam mahkamah. Pada hari yang sama, peguam responden telah memberikan notis bahawa beliau akan membangkitkan dua bantahan awal, iaitu: (a) bahawa tiada pertuduhan telah dibuat terhadap responden oleh Kesatuan India; dan (b) ketika waran pemberkasan dilaksanakan, tiada pertuduhan telah dibaca kepada responden. Pada 2 Disember 2002, hakim mahkamah sesyen telah membenarkan bantahan awal tersebut dan memutuskan bahawa responden haruslah dilepaskan tanpa bersyarat. Sehubungan itu, pasport antarabangsa responden telah dikembalikan kepada beliau. Pada 3 Disember 2002, pendakwa raya ('pemohon') telah memfailkan satu permohonan dalam Mahkamah Tinggi untuk satu kajian semula perintah mahkamah sesyen tersebut di bawah s 37(1) Akta tersebut. Pada 13 Disember 2002, Hakim Mahkamah Tinggi telah menolak permohonan untuk kajian semula tersebut dan mengesahkan keputusan mahkamah sesyen. Akibatnya responden telah dilepaskan tanpa syarat. Pemohon kemudiannya telah memfailkan notis rayuan kepada Mahkamah Rayuan ('notis rayuan tersebut'). Pada 16 Disember 2002, atas permohonan ex parte pemohon di bawah s 44(1) Akta Mahkamah Kehakiman 1964 ('permohonan ex parte tersebut'), mahkamah ini memerintahkan supaya dokumen-dokumen perjalanan responden termasuk pasport antarabangsa dan/atau pasport-pasport terhad beliau diserahkan kepada mahkamah sementara menantikan penyelesaian muktamad rayuan pemohon kepada Mahkamah Rayuan atau sehingga perintah yang selanjutnya ('perintah tersebut'). Ini adalah permohonan responden di dalam lampiran 15(a) untuk mengenepikan perintah tersebut dan untuk membatalkan notis rayuan tersebut. Alasan-alasan yang responden bergantung kepada bagi menyokong lampiran 15(a) adalah: (a) ketidakdedahan fakta-fakta material oleh pemohon ketika membuat permohonan ex parte tersebut bahawa responden telah meninggalkan Malaysia; (b) perkara tersebut adalah kini akademik kerana responden tidak lagi berada di Malaysia; dan (c) tiada hak untuk merayu terhadap keputusan Mahkamah Tinggi di dalam prosiding kajian semula tersebut. Encik Kamarul Hisham, bagi pihak pemohon, telah membangkitkan satu isu awal di permulaan pendengaran lampiran 15(a) bahawa responden mestilah pertamanya mematuhi perintah tersebut sebelum permohonan beliau untuk mengenepikan perintah tersebut boleh didengar.

Diputuskan, menolak bantahan awal pemohon dan membenarkan lampiran 15(a): A

(1) Ketika responden meninggalkan Malaysia pada 14 Disember 2002, perintah tersebut masih belum dibuat lagi. Untuk menghendaki beliau mematuhi perintah tersebut terlebih dahulu sebelum lampiran 15(a) boleh didengar akan bermakna bahawa B beliau terpaksa kembali ke Malaysia bukan sahaja untuk menyerahkan pasport beliau tetapi, secara berkesannya, untuk menyerahkan diri beliau sedangkan pada hakikatnya beliau telah dilepaskan tanpa bersyarat. Oleh itu, bantahan awal pemohon telah ditolak (lihat ms 133H, 134A–B); *Chuck v Cremer* 1 Coop T Cott 338, *Hadkinson v Hadkinson* [1952] 2 All ER 567 dibezakan, C *Wee Choo Keong v MBf Holdings Bhd* [1993] 2 MLJ 217 dan *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577 dibezakan.

(2) Berhubung dengan persoalan sama ada pemohon mengetahui D ataupun tidak mengetahui bahawa responden telah meninggalkan Malaysia sebelum permohonan ex parte tersebut dibuat, keterangan afidavit pihak-pihak berkenaan masing-masing adalah bercanggahan. Berdasarkan keterangan afidavit sedemikian sahaja, adalah tidak patut bagi Mahkamah Rayuan membuat satu keputusan fakta tetap mengenai sama ada pemohon mengetahui E bahawa responden telahpun meninggalkan negara ini ketika permohonan ex parte difailkan. Dalam keadaan tersebut, tidak boleh dinyatakan bahawa pemohon bersalah kerana ketidakdedahan fakta material ketika membuat permohonan ex parte tersebut. Oleh yang demikian, alasan ini tidak boleh menjadi alasan untuk mengenepikan perintah tersebut (lihak F ms 134F–I).

(3) Atas persoalan sama ada perintah tersebut adalah akademik, tujuan perintah tersebut adalah untuk menghalang responden daripada meninggalkan Malaysia sementara menantikan G rayuan tersebut. Jika perintah tersebut dalam bentuk satu perintah injunksi bagi menghalang responden daripada meninggalkan negara (yang mana tidak dilakukan), maka permohonan ex parte tersebut tentunya akademik. Tetapi, perintah tersebut adalah untuk responden menyerahkan pasport antarabangsa beliau dan tidak terdapat had masa untuk beliau H melakukan sedemikian. Responden boleh memilih untuk kembali ke Malaysia dan menyerahkan pasport beliau atau beliau boleh kembali dan perintah tersebut boleh dilaksanakan ke atas beliau. Lagipun, responden telah menetap di Malaysia sejak 1993 dan merupakan seorang pengarah syarikat di sini. Oleh itu, menimbangkan sifat perintah tersebut dan keadaan-keadaan kes I tersebut, perintah tersebut adalah tidak akademik kerana ia tidak dapat dipatuhi atau dikuatkuasakan sama sekali. Dalam

keadaan tersebut, perintah itu adalah tidak akademik (lihat ms 135D–H).

(4) Kuasa-kuasa dan bidangkuasa untuk menyiasat sesuatu perkara serah-balik terletak pada mahkamah sesyen dan menurut prosedur yang ditetapkan di bawah Akta tersebut. Mahkamah sesyen boleh membuat satu daripada kedua-dua perintah tersebut, iaitu, untuk melepaskan penjenayah buronan jika tiada kes prima facie dibuat atau memenjarakan beliau jika suatu kes prima facie dibuat. Tidak terdapat peruntukan untuk rayuan daripada keputusan mahkamah sesyen tersebut kepada Mahkamah Tinggi. Sebaliknya, jika penjenayah buronan tersebut dihukum penjara beliau boleh memohon kepada Mahkamah Tinggi untuk mendapatkan satu writ habeas corpus menurut prosedur seperti mana yang diperuntukkan di dalam Kanun Acara Jenayah. Akta tersebut tidak menyebut mengenai rayuan dari Mahkamah Tinggi dalam prosiding habeas corpus tersebut. Sebaliknya, jika penjenayah buronan tersebut dilepaskan oleh mahkamah sesyen, pendakwa raya boleh, atas permintaan negara yang cuba membawa beliau kembali, memohon kepada Mahkamah Tinggi untuk satu kajian semula. Mahkamah Tinggi boleh mengesahkan, mengubah atau membatalkan perintah mahkamah sesyen itu atau membuat satu perintah baru bagi menggantikan perintah tersebut yang telah dibatalkan sedemikian dan menurut s 37(6) Akta tersebut, perintah Mahkamah Tinggi akan menjadi muktamad. Oleh itu, cara untuk mencabar keputusan mahkamah sesyen adalah sama ada melalui satu permohonan untuk mendapatkan writ habeas corpus (atas permohonan penjenayah buronan) atau melalui satu kajian semula (atas permohonan pendakwa raya) (lihat ms 137G, 138H–139A, D–E).

(5) Berhubung dengan sama ada terdapatnya hak untuk rayuan selanjutnya dari Mahkamah Tinggi kepada Mahkamah Rayuan, Akta tersebut tidak menyebut mengenai keputusan Mahkamah Tinggi dalam permohonan habeas corpus oleh penjenayah buronan tersebut. Walau bagaimanapun s 36 Akta tersebut memperuntukkan bahawa permohonan untuk habeas corpus haruslah dibuat menurut Kanun Acara Jenayah ('KAJ') dan oleh itu, s 374 Kanun Acara Jenayah berhubung dengan rayuan terhadap satu keputusan dalam permohonan habeas corpus boleh dipakai. Sebaliknya, sesuatu keputusan Mahkamah Tinggi dalam permohonan untuk suatu kajian semula oleh pendakwa raya, adalah muktamad. Perkataan-perkataan 'final and conclusive' bermaksud bahawa perintah-perintah tersebut tidak boleh dirayu. Walaupun mahkamah sesyen dalam kes semasa telah membuat keputusan semata-mata atas bantahan awal dan bukan selepas siasatan sepenuhnya, hakikatnya kekal bahawa beliau telah memutuskan untuk melepaskan responden dan adalah terhadap

keputusan itu bahawa satu permohonan kepada Mahkamah Tinggi telah dibuat untuk kajian semula di bawah s 37 of Akta tersebut, di mana hakim Mahkamah Tinggi telah memberikan keputusan beliau. Adalah terhadap keputusan Mahkamah Tinggi itu bahawa pemohon merayu kepada mahkamah ini. Walau bagaimanapun, memandangkan peruntukan-peruntukan s 37(6) Akta tersebut, tidak terdapat hak untuk merayu kepada mahkamah ini (lihat ms 139F–H, 141H–142A).

(6) Seksyen 50 Akta Mahkamah Kehakiman 1964 tidak terpakai tetapi walaupun jika ia terpakai, ia tidak dapat membantu pemohon. Seskyen 50(1) memperuntukkan bahawa 'the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court ... in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court'. Perkataan 'revisionary' merujuk kepada 'revision' dalam Bab XXXI Kanun Acara Jenayah. Perkataan 'appeal' tidak termasuk 'review' kerana Kanun Acara Jenayah tidak memperuntukkan kajian semula. Bagi alasan yang sama perkataan 'revision' tidak boleh termasuk 'review'. Perkataan 'review' dalam Akta tersebut telah dengan sengaja digunakan untuk membezakannya daripada 'revision' di bawah Kanun Acara Jenayah (lihat ms 142A–E).

(7) Dalam keadaan tersebut, notis rayuan adalah batal. Perintah tersebut tidak boleh dikekalkan kerana ia hanya merupakan satu perintah interim menantikan penyelesaian rayuan tersebut. Sehubungan itu, perintah tersebut dan notis rayuan haruslah dibatalkan (lihat ms 144A–B).]

Notes

For cases on decision as to discharge, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue), para 1596.

For cases on extradition procedure, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 337–338.

Cases referred to

Abdi and another v Secretary of State for the Home Department and another [1996] 1 All ER 641

Chua Han Mow v Superintendent of Pudu Prison [1980] 1 MLJ 219

Chuck v Cremer (1846) 1 Coop temp Cott 338

Hadkinson v Hadkinson [1952] 2 All ER 567

Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd [2001] 4 MLJ 577

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385

Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd [2002] 4 MLJ 241

R v Dartmoor Prison Board of Visitors, ex p Smith [1986] 2 All ER 651

A *R v Secretary of State for the Home Dept, ex p Salem* [1999] 2 All ER 42
United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah & other applications [2003] 1 MLJ 465
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217
B *Yong Teck Lee v Harris Mohd Salleh & Ors* [2002] 3 MLJ 230

Legislation referred to

Criminal Procedure Code ss 173, 323, (1), 324, 325, 374, Chapters XXX, XXXI
C Courts of Judicature Act 1964 ss 26, 44(1), 50
Courts of Judicature (Amendment) Act 1995
Extradition Act 1992 ss 3, 13(1), 15, 18, 19, (4), (5), 36, 37, (1), (6), 41(1)
Federal Constitution
D Income Support (General) Regulations 1987 reg 70
Land Acquisition Act 1960 s 49(1)

Kamarul Hisham (Pendakwa Raya) (*Dato' Dr Cyrus V Das* with him) for the applicant.
Steven Thiru (watching brief for the Government of India).
E *Dato' Muhamad Shafee Abdullah* (*Rabinder Singh* with him) (*Shafee & Co*) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): On 16 December 2002, the public prosecutor (applicant) filed an ex parte
F notice of motion (encl 5(a)) under s 44(1) of the Courts of Judicature Act 1964 for an order:

> (1) that the travel documents of the respondent including his international passport(s) and/or restricted passport(s) be surrendered to court pending the final disposal of the applicant's appeal to the Court of Appeal herein or further order;

G

Sitting alone hearing the ex parte application, I granted the order as per prayer (1) above. This will be referred to as 'the order of 16 December 2002'.

On 26 December 2002, the respondent filed a notice of motion
H (encl 15(a)) praying for the following orders:

> (1) The ex parte order dated 16 December 2002 be set aside;
> (2) Notice of appeal dated 13 December 2002 be struck out;
> ...

I This was heard inter partes. This judgment is in respect of that motion (encl 15(a)). However, for the sake of consistency the parties will be referred to as the applicant and respondent as in encl 5(a).

A brief background of the case is necessary to understand the arguments of the parties.

The respondent, an Italian national, had lived in India since 1964. When in India he had given an undertaking through his counsel to the Supreme Court of India that he would present himself for investigation. However, in breach of the undertaking he failed to turn up as promised. He left India and came to Malaysia on 29 July 1993. The Union of India sought the extradition of the respondent for offences involving criminal conspiracy. Upon request for extradition by India, the Malaysian Ministry of Home Affairs, on 15 December 2000, issued a special direction under s 3 of the Extradition Act 1992 ('the Act'). A warrant of apprehension was issued by the magistrate under s 13(1) of the Act on 8 December 2000. The warrant was served and the respondent was arrested on 20 December 2000. He was produced before the magistrate and the case was transmitted to the sessions court pursuant to s 15 of the Act. When the respondent appeared before the sessions court, he was granted bail pending the hearing of the extradition proceedings. He was required to surrender his international passport and deposit a sum of RM400,000 into court.

On the same day (20 December 2000) the respondent through his counsel, gave notice that he would be raising two preliminary objections, namely:

(a) that no charges had been framed against the respondent by the Union of India; and

(b) when the warrant of apprehension was executed, no charges had been read out to the respondent.

The said preliminary objection was heard on 12 February 2001 but the sessions court judge reserved his decision to 3 April 2001.

In the meantime, the respondent commenced judicial review proceedings in the High Court and obtained leave as well as an order to stay the extradition proceedings in the sessions court. This prevented the sessions court from giving its decision on 3 April 2000. The Union of India intervened in the judicial review proceedings and together with the Government of Malaysia opposed the judicial review application. On 21 October 2002 the High Court dismissed the application for judicial review. Subsequently, on 2 December 2002, the sessions court judge delivered his decision on the preliminary objections. The sessions court judge upheld the preliminary objections of the respondent and decided that the respondent should be discharged unconditionally. Accordingly the respondent's international passport was returned to him.

On 3 December 2002, the applicant filed an application in the High Court for a review of the order of the sessions court under s 37(1) of the Act.

On 10 December 2002 the honorable Attorney-General of Malaysia decided to grant a fiat or written authorization to Dato' Dr CV Das, counsel for the Union of India, under s 41(1) of the said Act to appear on his behalf

A in the review proceedings. This 'review' proceedings should not be confused with the earlier 'judicial review' proceedings.

On 10 December 2002 the learned judge of the High Court decided that the said fiat was unlawfully issued.

B On 13 December 2002 the High Court judge dismissed the review application and confirmed the decision of the sessions court. As a result the respondent was released unconditionally. The applicant filed a notice of appeal to this court.

On 16 December 2002 the applicant applied for and obtained the ex parte order that the respondent is seeking to set aside now, besides the C notice of appeal.

Preliminary issue

Encik Kamarul Hisham, for the public prosecutor (applicant in encl 5(a)) D raised a preliminary issue at the beginning of the hearing of the respondent's application (encl 15(a)). He argued that the respondent must observe the order of 16 December 2002 first before he should be heard on his application to set aside the said order. He cited the cases of *Chuck v Cremer* (1846) 1 Coop temp Cott 338; 41 ER 1028 (1846); *Hadkinson v Hadkinson* [1952] 2 All ER 567 and *Wee Choo Keong v MBf Holdings Bhd & Anor and* E *another appeal* [1993] 2 MLJ 217.

We do not think that those cases are of any assistance to the applicant in this case. *Chuck v Cremer* is an authority for the proposition that a party who knows of a null or irregular order, should apply to discharge it. Whilst such an order is in existence it must not be disobeyed.

F *Hadkinson v Hadkinson* decided that:

> Held: it was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being G in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt; ...

Wee Choo Keong is also a contempt case where it was said that a party in contempt cannot be heard until he has purged his contempt.

H This is not such a case. Here, it is not in dispute that at the time when the respondent left the country on 14 December 2002 the order of 16 December 2002 had not been made yet. In fact, the ex parte application had not been filed yet. The position is also very different from that in *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [2001] 4 MLJ 577, a I judgment of this court which was subsequently confirmed by the Federal Court (see *Monatech (M) Sdn Bhd v Jasa Keramat Sdn Bhd* [2002] 4 MLJ 241).

This is not a contempt proceedings. The respondent is applying to set aside an ex parte order ordering him to surrender his international passport. He had left the country before even the application, what more the order, was made. To require him to comply first before his application can be heard would mean that he would have to come back to Malaysia not only to surrender his passport but, effectively, to surrender himself when there is no order placing him on bail and when, in fact, he has been unconditionally discharged.

In the circumstances, we overruled the preliminary objection and proceeded to hear the respondent's application on merits.

Main grounds

Dato' Muhammad Shafee put forward three main grounds in support of the application. They are, first, there was a non-disclosure of material facts by the applicant when making the application in encl 5(a). Secondly, the matter is now academic. Thirdly, there is no right of appeal against the decision of the High Court in the review proceedings.

Non-disclosure of material facts

This ground only concerns the application to set aside the order of 16 December 2002.

Learned counsel for the respondent argued that the ex parte order of 16 December 2002 should be set aside on the ground of non-disclosure of material facts by the applicant that the respondent had left the country when the application was made. On the question whether the applicant knew or did not know that the respondent had left the country before the application was made, affidavit evidence is conflicting. In their affidavits Dato' Muhammad Shafee and Mr Rabinder Singh, solicitors for the respondent said that the applicant knew about it. Encik Kamarul in his affidavit said that 'there was at all material times uncertainty regarding the respondent's whereabouts due to the conflicting statements made by the respondent ... and his solicitors ...'.

Based on such affidavit evidence alone, it would not be right for this court to make a definite finding of fact whether the applicant knew that the respondent had left the country when he filed the application on 16 December 2002. In fact, since it is the respondent who alleges it, it can be said that it is not proved that the applicant knew for sure that the respondent had left the country when the respondent made the application on 16 December 2002. In the circumstances, it cannot be said that the applicant is guilty of non-disclosure of a material fact when making the ex parte application. So this ground cannot be a ground for us to set aside the order of 16 December 2002.

A *Academic*

It was also argued by the learned counsel for the respondent that the order is purely academic and unenforceable. This is because the fact is, whether known to the applicant or not, at the time when the order was made, the respondent was no longer in the country and is not in the country now. The B whole purpose of the order was to prevent him from leaving the country. There is no way in which the order can be enforced, short of the respondent willingly coming back to Malaysia, which is most unlikely.

Encik Kamarul, for the applicant argued that the order is not academic because, first, there is no fixed period for the respondent to comply. It could C be complied later if and when the respondent returns to Malaysia. Secondly, it is a matter of public interest that the issues, especially of law, that arise in this proceedings be determined by this court.

The first argument of En Kamarul clearly applies to the application to set aside the order of 16 December 2002, while the second argument, ie the D public interest issue is only relevant to the application to set aside the notice of appeal.

On the question whether the order is academic, we are of the view that we will have to consider the nature of the order in the light of the circumstances of the case. There is no doubt that the purpose of the order E was to prevent the respondent from leaving the country pending the disposal of the appeal. But, the order is not in the form of an injunction to restrain the respondent from leaving the country. If that is the nature of the order, then there is no doubt that it is academic. But, the order is for the respondent to surrender his international passport. There is no time limit for him to do so. He may choose to return to Malaysia and surrender his F passport or he may return and the order may be enforced on him.

In this case, the respondent had come to and lived in Malaysia since 1993 and there is evidence that he is the principal director of EATI Sdn Bhd and that he conducted all his business dealings in Malaysia through this company, even though the company is in a poor financial state — para 10(4) G of the affidavit of En Kamarul Hisham, the Deputy Public Prosecutor. In other words, considering the nature of the order and the circumstances of the case, the order is not academic in the sense that it cannot be complied or enforced at all. It would be different if the respondent were a mere tourist on a short stay with no residence, no address and no business in Malaysia and has left the country for good, under which circumstance, the order may H be academic.

In the circumstances, we are of the view that the order is not academic.

On the second issue, ie public interest issue, we were referred to a I number of English cases by En Kamarul, namely *R v Dartmoor Prison Board of Visitors, ex p Smith* [1986] 2 All ER 651, *Abdi and another v Secretary of State for the Home Department and another* [1996] 1 All ER 641.

We think it is sufficient for us to discuss the House of Lords' judgment in *R v Secretary of State for the Home Dept, ex p Salem* [1999] 2 All ER 42 ('*ex p Salem*'). In that case, Salem, a Libyan national, arrived in the United Kingdom in April 1997 and claimed political asylum. He was granted temporary admission and awarded income support and related benefits. In May 1997 a Home Office memorandum recorded that asylum had been refused. Sometime before 5 September 1997 the Home Office informed the Benefits Agency that Salem's claim had been recorded as determined, thereby causing the agency to cease payment of benefits. Despite that, the Home Office subsequently asked Salem's solicitors for further evidence to enable the Secretary of State to determine the application. In November 1997 Salem was informed by the agency that his income support had been stopped because his application for asylum had been refused, but it was not until May 1998 that he was informed of that refusal by the Home Office. He appealed to the immigration adjudicator and also applied for judicial review of the Secretary of State's decision to notify the agency that his application for asylum had been refused. That application was eventually dismissed by the Court of Appeal, and Salem appealed to the House of Lords. Before the appeal was heard, he was granted refugee status by the immigration adjudicator. The question arose whether the House of Lords should hear the appeal because it raised an issue of general importance, namely the time at which a claim for asylum was 'determined' by the Secretary of State within the meaning of reg 70 of the 1987 Regulations [the Income Support (General) Regulations 1987], even though the appeal was academic.

> Held — The House of Lords had a discretion to hear an appeal in a cause where there was an issue of public law involving a public authority even though by the time the appeal was due to be heard there was no longer a lis to be decided directly affecting the rights and obligations of the parties as between themselves. However, the House would exercise that discretion with caution and would not hear appeals if the result would be academic between the parties unless there was good reason in the public interest for doing so, eg where there was a discrete point of statutory construction not involving a detailed consideration of the facts and where it was likely that the issue would have to be resolved in the near future because a large number of similar cases existed or were anticipated.

We agree with the principle of the case. However, it should be noted that the issue there is whether an appellate court should hear an appeal even though it is academic. The case cited above is not relevant in regard to the application to set aside the order of 16 December 2002. But, it is relevant for the determination of the issue whether the notice of appeal should be struck out.

Considering the number of important issues arising from the present case, in particular whether charges should have been framed against the respondent by the Union of India and read to him when he appeared at the sessions court, whether the sessions court was empowered to discharge the respondent without holding a full enquiry pursuant to s 19 of the Act,

whether the learned High Court judge, in the review proceedings, exceeded his jurisdiction in considering matters other than those considered and decided upon by the sessions court judge and whether the learned High Court judge was right in his interpretation of the phrase 'advocate and solicitor' in s 41(1) of the Act; and further considering that the issues, as far as we know, have never been decided by this or a more superior court, this case should be a proper case for us to exercise our discretion to hear the appeal. But, that is subject to one most important condition, that is, in law there must be a right of appeal to this court. If there is none, then this court has no discretion to exercise.

Is there a right of appeal?

We now come to the most vital issue: whether in an extradition proceedings, there is a right of appeal from the decision of the High Court to the Court of Appeal. This is the main issue in this application. If there is no right of appeal, then the purported notice of appeal must be struck out and the application for an interim order under s 44(1) of the Courts of Judicature Act 1964 is not maintainable.

It should be noted that sitting alone on 16 December 2002 hearing the application, ex parte, I avoided making a definite finding whether the appellant had a right to appeal against the order of the High Court in question. I merely satisfied myself that a notice of appeal had been filed, it had not been struck out and that there was a de facto appeal pending. I took that approach because I knew that in a matter of days the same issue would be heard inter partes by a three judge panel. It would be premature, for me, sitting alone, hearing only one side, to make a definite and final decision on the issue. We shall now do what I did not do, then.

Extradition proceedings is a criminal proceedings but it is in the nature of a committal proceedings and a committal proceedings is not a trial — *Chua Han Mow v Superintendent of Pudu Prison* [1980] 1 MLJ 219.

The powers and jurisdiction to inquire into an extradition matter is vested in the sessions court and in accordance with the procedure specified under the Act — s 18. Section 19(4) and (5) provides as follows:

> (4) If the Sessions Court is of the opinion that a *prima facie* case is not made out in support of the requisition of the country concerned, the Court shall discharge the fugitive criminal.
>
> (5) If the Sessions Court is of the opinion that a *prima facie* case is made out in support of the requisition of the country concerned, the Court shall commit the fugitive criminal to prison to await the order of the Minister for his surrender, and shall report the result of its inquiry to the Minister; and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of the Minister.

Section 36 of the Act provides:

> A fugitive criminal who is committed to prison under this Act may apply to the High Court for a writ of *habeas corpus* in accordance with the procedure as provided in the Criminal Procedure Code.

Section 37 of the Act provides:

> (1) Where a fugitive criminal is ordered by the Sessions Court to be discharged under subsection 19(4), the Public Prosecutor may, at the request of the country seeking his return, within ten days of the making of the order by the Sessions Court, apply to the High Court for a review of the order of discharge on any question of law, and on such application the High Court may so review the order.
>
> (2) Where the Public Prosecutor desires to make such an application, he shall, at the time of the making of the order of discharge by the Sessions Court, give to the Court notice of his intention to apply to the High Court for a review of the order, and such notice shall operate as a stay of the order of discharge by the Sessions Court —
>
> (a) until the expiration of the period of ten days, beginning with the day on which the order of discharge was made; or
>
> (b) if an application for a review of the order of discharge is made, until the determination of the application by the High Court.
>
> (3) Where the Public Prosecutor gives notice of his intention to apply for a review of the order of the Sessions Court, the Court may grant, to the fugitive criminal in respect of whom the order of discharge was made, bail pending the determination by the High Court of the application.
>
> (4) Upon application for a review of the order of discharge, the Sessions Court Judge shall transmit to the High Court the exhibits tendered before him, the evidence admitted in Court, the reasons for his decision and his finding on any question of law which arose during the inquiry.
>
> (5) The High Court to which an application is made for a review of an order of discharge may order the release on bail of the fugitive criminal on such terms and conditions as the Court thinks fit pending determination of the application for review.
>
> (6) The High Court may confirm, vary or quash the order or make a new order in substitution for the order so quashed, and any such order of the High Court shall be final and conclusive.

A few points should be noted here. First, the procedure for the inquiry is as specified under the Act. Secondly, the sessions court may make one of the two orders: discharge the fugitive criminal if no prima facie case is made out or commit him to prison if a prima facie case is made out. Thirdly, there is no provision for appeal from the decision of the sessions court to the High Court. Instead, if the fugitive criminal is committed to prison he may apply to the High Court for a writ of habeas corpus in accordance with the procedure as provided in the Criminal Procedure Code. The Act is silent regarding appeal from the High Court in the habeas corpus proceedings. On the other hand, if the fugitive criminal is discharged by the sessions

court, the public prosecutor may, at the request of the country seeking his return, apply to the High Court for a review. Then s 37(6) of the Act specifically provides that an order of the High Court either confirming, varying or quashing the order of the sessions court or a new order in substitution for the order so quashed shall be final and conclusive. There is no similar provision (ie that the order of the High Court shall be final and conclusive) in respect of an order of the High Court in the habeas corpus application by the fugitive criminal.

Contrast these with the provisions in the Courts of Judicature Act 1964 and the Criminal Procedure Code in respect of ordinary criminal trials. I shall only mention the major points. First, the sessions court may acquit or convict the accused person — s 173 of the Criminal Procedure Code. Secondly, without going into details, in either case, a party dissatisfied with the decision of the sessions court may appeal to the High Court — Chapter XXX of the Criminal Procedure Code and s 26 of the Courts of Judicature Act 1964. From the decision of the High Court, again without going into details, either party may appeal to the Court of Appeal — s 50 of the Courts of Judicature Act 1964.

So, is there a right of appeal from the sessions court to the High Court from a decision in an extradition proceedings? In our view, the answer is in the negative. The Act, a specific Act, provides the procedure for such an inquiry. The way to challenge the decision of the sessions court in such a proceedings is either by way of an application for a writ of habeas corpus (on the application by the fugitive criminal) or by way of a review (on the application by the public prosecutor). It is these provisions that are applicable, not the provisions of the Criminal Procedure Code or the Courts of Judicature Act 1964.

Is there a further appeal from the High Court to the Court of Appeal? Again, we will have to look at the provisions of the Act first. The Act is silent regarding a decision of the High Court in a habeas corpus application by the fugitive criminal. However, as the Act (s 36) itself provides that the application for habeas corpus is to be made in accordance with the procedure as provided by the Criminal Procedure Code, the provision of s 374 of the Criminal Procedure Code regarding appeal against a decision in a habeas corpus application applies. The case of *Chua Han Mow* is one such example.

On the other hand, regarding a decision of the High Court in an application for a review by the public prosecutor there is a specific provision in the Act that the order made by the High Court is final and conclusive.

Do the words 'final and conclusive' mean that the orders are not appealable? We are of the view that the answer is obvious, ie such orders are not appealable. We do not think that any other meaning could be given to the phrase.

In election petition cases, the words 'shall be final' have again and again been held to mean unappealable. We need only look at the majority decision

of this court in *Yong Teck Lee v Harris Mohd Salleh & Ors* [2002] 3 MLJ 230. This is the latest of such cases. Most, if not all earlier judgments were considered. The Federal Court had refused an application for leave to appeal to it (OM No 08–46–2002 (S). So what is said in the majority judgment of the Court of Appeal is final and law.

I shall not repeat the arguments regarding the provisions of the Constitution with regard to the establishment of this court, the provisions of the Courts of Judicature Act 1964 and of all other arguments that had been put forward in *Yong Teck Lee*. The answers are to be found in that case.

However, we think we should add that subsequent to *Yong Teck Lee*, the Federal Court has delivered its judgment in *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah & other applications* [2003] 1 MLJ 465. It was a five-judge bench. The issue was whether appeals in land acquisition cases would lie to the Court of Appeal or the Federal Court having regard to the provisions of the Land Acquisition Act 1960, the Federal Constitution and the Courts of Judicature Act 1964 and the amendments to all those Acts.

For the sake of clarity, perhaps we should set out the chronology of events:

Before 24 June 1994 — all appeals lay to the Supreme Court.

On 24 June 1994 — pursuant to the amendments to the Federal Constitution and the Courts of Judicature Act 1964, the Supreme Court was renamed 'Federal Court'. The Court of Appeal was established. Generally speaking, from 24 June 1994, appeals from a decision of the High Court goes to the Court of Appeal.

With effect from 1 March 1998, pursuant to the amendment to the Land Acquisition Act 1960, appeals in land acquisition cases lie to the Court of Appeal.

We would only like to highlight the majority judgments of the Federal Court regarding the effect of the establishment of the Court of Appeal on the provision of s 49(1) of the Land Acquisition Act 1960. The provision of s 49(1) of the Land Acquisition Act 1960 prior and subsequent to the creation of the Court of Appeal and until 28 February 1998 was that appeals lay to the Supreme Court/Federal Court. In other words, the fact that the Federal Constitution and the Courts of Judicature Act 1964 were amended to establish the Court of Appeal did not affect the provision of s 49(1) of the Land Acquisition Act 1960. Appeals continued to lie to the Supreme Court/ Federal Court and not to the Court of Appeal. Only after s 49(1) of the Land Acquisition Act 1960 was amended to provide that appeals should lie to the Court of Appeal (as from 1 March 1998) that such appeals lie to the Court of Appeal.

The point we are making here is this: the amendments to the Constitution and the Courts of Judicature Act 1964 did not affect the provision of s 49(1) of the National Land Code 1960 regarding appeals.

A The change only came about when the Land Acquisition Act 1960 itself was amended.

Likewise, we are of the view that the same amendments do not affect the provisions of s 37(6) of the Act and do not confer the right of appeal in extradition cases.

B *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 was cited to us. But, we do not think that that case is an authority for the interpretation of the words 'shall be final and conclusive'.

We are of the view that, for the same reasons given by this court in *Yong*
C *Teck Lee*, there is no right of appeal against an order of the High Court confirming the order of the sessions court discharging a fugitive criminal. The Legislature has made it very clear that that is what it wanted the law to be. It is not for the court to rewrite the law made by the Legislature. It is not its function. Neither should it encroach into the jurisdiction of the
D Legislature.

It was argued for the applicant that the provision of s 37(6) of the Act applies only to a full merit inquiry under s 19. In this case the sessions court did not hold such an inquiry but instead summarily discharged the respondent on preliminary objections relating to the non-existence of the
E charges. It was also argued that the learned judge of the High Court had failed to confine himself to the issues that were raised before the sessions court and instead erroneously embarked on a full blown inquiry under s 19 of the Act and decided on matters that were not strictly before him. The learned High Court judge erred in law when he conducted the review under s 37 of the Act as if it was an inquiry under s 19 of the Act and
F thereby allowed the proceedings to miscarry. In doing so the learned High Court judge exceeded his jurisdiction and power under s 37 of the said Act. A number of grounds were also forwarded on the merits of the appeal, including that a formal charge was not a pre-requisite to a request for extradition under the Act and that the learned judge had erred in law when he construed the phrase 'advocate and solicitor' in s 41(1) of the
G Act as not including an Advocate and Solicitor of the High Court of Malaya.

We must first of all note that we are not, at this stage, hearing the appeal against the decision of the learned High Court judge. Therefore, whether he was right or wrong is not for this court to decide in this application. We are
H only hearing the application to set aside the order of 16 December 2002 and the notice of appeal. And, the issue we are now discussing is whether, in law, there is a right of appeal from the decision of the learned High Court judge.

It is true that the sessions court had decided merely on the preliminary
I objection and not after a full enquiry under s 19. But, the fact remains that he had decided to and discharged the respondent. It is a fact that against that decision there was an application for a review under s 37, a review was

done and the learned High Court judge had given his decision. It is against that decision that the applicant purports to appeal to this court. Is there a right of appeal? That is the question. We are of the view that, in view of the provisions of s 37(6) of the Act, there is none.

In any event s 50 of the Courts of Judicature Act 1964, even if applicable (which we think is not), does not help the applicant. Section 50(1) of the Courts of Judicature Act 1964 provides that 'the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:

(a) ...

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

The words 'or revisionary' were inserted by Act A909 which came into force on 24 June 1994. The word 'revisionary' clearly refers to 'revision' in Ch XXXI of the Criminal Procedure Code, especially s 323. If the word 'appeal' includes 'revision', there is no reason for the word 'revision' to be inserted. The word 'appeal' too cannot include 'review'. As far as we can ascertain, the Criminal Procedure Code does not provide for a review. For the same reason the word 'revision' cannot include 'review'. It appears in the Extradition Act 1992. We are of the view that the word 'review' was purposely used to distinguish it from 'revision' under the Criminal Procedure Code.

There are clear distinctions between a 'revision' under the Criminal Procedure Code and a 'review' under the Act.

First, the Criminal Procedure Code does not state at what particular stage of a proceedings in the subordinate court that the High Court may exercise the power of revision. On the other hand, a review under the Act may only be made after the close of the proceedings in the sessions court.

Secondly, in the case of a revision, the High Court judge himself may call for the record for the purpose of revision. In the case of a review, it has to be on an application by the public prosecutor at the request of the country seeking the return of the fugitive criminal.

Thirdly, review is only against an order of a discharge and nothing else. On the other hand, the reasons for which a High Court judge may exercise his power of revision is much wider, ie 'for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that Subordinate Court' — s 323(1) of the Criminal Procedure Code.

Fourthly, without going into details, the powers of a High Court judge in a revision is much wider than that of a judge hearing a review under the Act — see ss 36 and 37 of the Act and ss 324 and 325 of the Criminal Procedure Code. Furthermore as said by the Federal Court in *Chua Han*

A *Mow* an extradition proceedings is in the nature of a committal proceedings, not a trial.

We are also of the view that had the Legislature intended to include a review under the Extradition Act 1992, it would have inserted the word 'review' when it inserted the word 'revisionary' in s 50 of the Courts of
B Judicature Act 1964.

It was also argued that the public prosecutor is also appealing against the order of the High Court in declaring that the fiat given by the Attorney-General to Dato' CV Das was unlawful as it does not fall within the provisions of s 41(1) of the Act. The first thing to be noted is that there is
C no separate appeal against that decision. There is only one notice of appeal and it says:

> SILA AMBIL NOTIS bahawa Perayu yang dinamakan di atas tidak berpuashati dengan keseluruhan keputusan Yang Arif Dato' Augustine Paul yang diberikan di Mahkamah Tinggi Jenayah Kuala Lumpur pada 13 Disember 2002 di mana Mahkamah telah menolak permohonan Pemohon/
D Perayu untuk satu semakan di bawah s 37(1) Akta Ekstradisi 1992 dan seterusnya melepaskan Responden tanpa syarat, kini merayu terhadap keseluruhan keputusan tersebut.

Note that the appeal is against the decision of the learned judge in which he dismissed the application of the applicant for a review under s 37 of the Act
E and thereby discharged the respondent unconditionally.

In any case, that ruling is only a subsidiary ruling. The main decision of the High Court is the confirmation of the discharge order by the sessions court, which we hold is not appealable. If the main decision is not appealable we do not see how a subsidiary ruling in the decision is
F appealable. What good would it do anyway? Even if the ruling is appealable and this court decides in favour of the public prosecutor, still it will not affect the main decision, it will not make the main decision appealable and be reversed.

If we may be excused for saying so, we think it is very unfortunate that this and higher courts are deprived of the opportunity to determine the
G important issues that have arisen in this case. It is unfortunate that the determination of such important issues are left only to the High Court to determine and become law. If we may suggest, we think that the Legislature should consider amending the Act to provide for appeals in cases such as this. The highest court in the country should have the opportunity to
H determine such important points of law. What more when the decision affects the bilateral relationship between Malaysia and a foreign country. Furthermore, if a fugitive criminal, through habeas corpus proceedings, may go to the highest court in the country to challenge an order made against him, we see no reason why the public prosecutor, representing the Government of Malaysia at a request of a country with which Malaysia has
I entered a binding agreement for the extradition of fugitive criminals, should not have a similar right where an order is made in favour of the fugitive criminal. But that is a matter for the Legislature to decide. The Judiciary

should and could say no more. The function of the court is to apply the law as it is.

In the circumstances, the order dated 16 December 2002 cannot stand. After all that is an interim order pending the disposal of the appeal.

The notice of appeal too is void. For this reason alone the order dated 16 December 2002 and the notice of appeal dated 13 December 2002 should be struck out.

Applicant's preliminary objection overruled and encl 15(a) allowed.

Reported by Lim Lee Na